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In the Supreme Court of the United States

OCTOBER TERM, 1941

WILBUR E. DOW, PETITIONER

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND HENRY L. STIMSON, SECRETARY OF WAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The district court rendered no opinion. The opinion of the Court of Appeals for the District of Columbia (R. 45–53) is reported in 123 F. (2d) 909.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered August 4, 1941 (R. 54). By an order of this Court entered on October 28, 1941, the time within which to file a petition for a writ of certiorari was extended to,

and including, January 3, 1942 (R. 56). The petition was filed January 3, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, after all the open trap fishing sites have been occupied, a complaint will lie to direct the Secretary of Interior to open additional sites which were closed for conservation purposes by regulations issued under the Act of June 6, 1924, on the ground that the regulations exclude the petitioner from his equal right to fish in waters where fishing is permitted.

STATUTE INVOLVED

Section 1 of the Act of June 6, 1924, c. 272, 43 Stat. 464, as amended by Reorganization Plan No. II, Sec. 4e, effective July 1, 1939, 53 Stat. 1433 (48 U. S. C., Secs. 221, 222) provides:

> That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of the Interior from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved

the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. * * * *Provided,* That every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior. * * *

STATEMENT

The judgment sought to be reviewed (R. 54) affirmed orders (R. 42–43) dismissing for failure to state a claim for relief petitioner's complaint against respondents, the Secretary of the Interior and the Secretary of War. The material allegations may be summarized as follows:

Beginning in 1927, the Bureau of Fisheries closed all areas in Alaskan waters to fishing by trap. Since that time it has permitted applications to be made for the opening of specific trap sites. After applications are filed the Department from time to time issues regulations listing the

sites opened to fishing (R. 5–6, par. 18). In November 1939 petitioner applied to the Bureau of Fisheries for the "allocation" to him of two sites in Alaskan waters within the limits of which he might take salmon by trap (R. 2, par. 2, 3). On January 6, 1940, the Secretary of the Interior, by issuing regulations which did not list the sites applied for, denied the application (R. 3, par. 5).[1] However, numerous other trap sites opened prior to petitioner's application and held by others than petitioner were allowed to remain open (R. 3, par. 8), but petitioner did not desire to occupy any of those sites for they were taken by others (R. 6, par. 21, 22). Petitioner also applied to the Secretary of War for a permit to erect salmon traps on the two chosen sites but the Secretary of War denied the permit (R. 2–3, 4).[2]

The complaint prayed that the Secretary of the Interior be enjoined from enforcing the regulations issued by him and be compelled to adopt one of three courses: (1) To open to salmon trapping the two sites desired by petitioner, (2) to open to such trapping enough of the coast line so that

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[1] These regulations, which were filed February 23, 1940 (5 Fed. Reg. pp. 747–754), amended regulations filed February 13, 1939 (4 Fed. Reg. pp. 908–938).

[2] Section 10 of the Act of March 3, 1899, c. 425, 30 Stat. 1121, 1151, 33 U. S. C. sec. 403, prohibits the erection of structures in the waters of the United States except on plans recommended by the Chief of Engineers and authorized by the Secretary of War.

petitioner might select a suitable site, or (3) to revert to the type of regulations in effect before 1927 whereby all the waters of Alaska, with exceptions not here material, were open to salmon trapping (R. 8). The complaint further prayed that the Secretary of War be enjoined from continuing his practice of issuing only one permit to a trap site (R. 8).

The district court dismissed the complaint on the defendants' motions (R. 42–43). The court of appeals affirmed the order of dismissal (R. 54). It held that the prayers for affirmative relief were not within the power of the court to grant because they involved matters within the discretion of the Secretary of the Interior (R. 48–50). The court of appeals also held that the regulations were not invalid merely because the limitation of the number of sites and the physical conditions requiring that each site have but one occupant, ~~together~~ resulted in depriving petitioner of the opportunity to engage in trap fishing. Since petitioner did not seek to fish in the opened waters, the court held that it did not need to consider and did not decide whether the Secretary used proper standards in allocating the sites available (R. 51–53).

ARGUMENT

1. The decision of the court below that affirmative relief was beyond its power to grant, was clearly correct. *Work* v. *Rives*, 267 U. S. 175, 177.

Under the statute the opening or closing of fishing areas is highly discretionary.

2. Petitioner's attack upon the regulations does not raise any substantial question. He does not seek to fish in the waters opened by the regulations. As the court of appeals emphasized (R. 48, 49, 50, 53), petitioner seeks by this action, not an equal opportunity to fish in the waters opened by the regulations, but to compel the Secretary of the Interior to open additional Alaskan waters to salmon trapping. He contends (Pet. 11–17) that in refusing to do this the Secretary has violated that provision of Section 1 of the Act of June 6, 1924, 48 U. S. C. sec. 222, which declares that no citizen shall be denied the right to take fish "in any area of the waters of Alaska *where fishing is permitted* by the Secretary" [italics added]. But, petitioner cannot use that clause of the statute to compel the Secretary to open additional areas simply because others—rightly petitioner admits—have occupied the opened areas. The consequence of his interpretation, in the words of the court below, would be that "the number of traps could be limited only by the number of applicants and of available sites, not by the Secretary's judgment concerning the number appropriate for proper conservation. Such a construction would defeat the primary purpose of the Act" (R. 52).

The statute, therefore, does not require the Secretary to open new trapping sites for every

applicant. Where the number of fishermen is too great to occupy the open area, it would seem that no more is required than that the allocation be made on an equitable basis. But, petitioner does not complain of the allocation of opened sites.

3. Since petitioner was not entitled to trap salmon on the sites selected by him, he has no complaint against the Secretary of War for refusing to permit erection of traps on those sites. The practice of the Secretary of issuing but one permit for a trap site is irrelevant.

CONCLUSION

The decision of the court of appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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